

Vietnam Towards “Rule-of-law State” or “Rule-of-law Society”? Some Analysis from the Rule of Law theory¹

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Abstract: *Although much discussion has recently focused on the political and legal term ‘the Rule of Law’ and the so-called “Nha nuoc phap quyen” (Rule-of-law State), consensus has not yet been reached on some aspects. The paper traces the origin of “the Rule of Law” and analyses its meanings according to international conventional wisdom in comparison with the viewpoint of the Rule-of-law State in Vietnam. To our understanding, “the Rule of Law” and rule-of-law State are not completely identical in terms of their origin and interpretation, as “the Rule of Law” implies a “rule-of-law society” rather than a rule-of-law State (rule-of-law State or law-based State). In the current context, Vietnam shall build a rule-of-law society in the spirit of its original principle.*

Keywords: The Rule of Law, Rule-of-Law Society, Rule-of-law State, Vietnam

1. Origin and concept of the Rule of law

Absent a consensus on The Rule of Law, it's popular among academics that the term was systematically presented by Albert Venn Dicey for the first time in *Introduction to the Study of the Law of the Constitution* (1885). According to Dicey, The Rule of Law (or Supremacy of

Law) and Parliamentary supremacy, two distinct and complementary principles of British constitutional law and cultural-political traditions, was formed over a long period (from the twelfth century) (Dicey, 1979 [1885]: 183-184, 406). The Rule of Law means to “uphold the law”, which is reflected in three principles: First (and the core one), equality before the law and before the courts and tribunals: no man is above the law; every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals. Second, The Rule

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of Law contradicts discretionary power: no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. Third, the principles of the constitution, based on The Rule of Law, are the consequences, rather than the sources, of human rights being given through judicial precedents (Dicey, 1979 [1885].): 193, 188, 195-196).

Dicey's view can give rise to controversy, for example, how is the principle of no man above the law understood with the supremacy of the Parliament? At this "contradictory" point, it is necessary to trace it back to the political tradition of Great Britain. Its Parliament in theory has absolute supremacy, but would only express its will through laws enacted under certain processes. Any law that is expected to be supreme requires the "consent" of the court and must become part of Common Law. In other words, the jurisdiction of the Parliament is merely "proposing/submitting" laws. Only when the court "passes" the law, does the law be supreme. Therefore, The Rule of Law and the supremacy of the Parliament (law-making) are not contradictory, but complementary. The Rule of Law is not only equality before the law, but also before the judicial court.

In its relationship with the court, due to its alliance in the struggle with the monarchy, the Parliament shows much respect and support for the independence of the court. Traditionally, conventional judges have read the law aloud and made their judgments based on their legal views (preferring procedural over substantive

law). Judges could not declare repeal of statutes of Parliament but confuse or render them unenforceable (if necessary). The Common Law and The Rule of Law traditions are associated with natural law, sometimes "fundamental, immutable and supreme one", acting as a constitutional oversight mechanism, binding Parliament and the courts (Brewer-Carías, 1989: 98; cited by Bui Ngoc Son, 2009). The law is respected by everyone in society, even the royal family puts itself under the law. Conflicts in society are all resolved by law. Besides, other factors such as a solid, strict case law built over time, the role of the public opinion, the academic community, periodical elections, etc are the premise for distinctive features of the British political tradition.

The British tradition of The Rule of Law was inherited and expanded in the United States and is represented by the typical term Due Process of Law (the fair and right and just law which can be interpreted as follows: no one is subject to any punishment or harm from the authorities unless it is the result of a course of predetermined legal proceedings). The idea of Due Process of Law was already present in the Magna Carta (1215), but was adopted and much more developed in the United States. In the United States, the monarchy or the supremacy of the Parliament is no longer accepted, instead, the people's constitutional right is distinguished from the legislative power of Congress and the supreme. The Constitution is the highest law that the government must obey. State power is divided into legislative-executive-judicial

powers with a mechanism of restraint and counterbalance and compliance with federal institutions. Due Process of Law becomes a constitutional principle through the 5th and 14th Amendments whereby the judicial courts use both procedural and substantive due process to check the constitutionality of laws and public acts to combat abuse of power and protect the fairness of the law.

In summary, The Rule of Law in Anglo-American societies can be understood that the spirit of law-abiding is combined with political-legal and cultural institutions to ensure the fairness of law (such as traditional case law, an independent judiciary, and decentralization, etc.). Law according to The Rule of Law has a “dominant” position, respected by society because it acquires both procedural and substantive justice. Regarding procedural law, the Anglo-American legal tradition in the last two hundred years has focused almost exclusively on the formality of the law, that is, in their opinion, only predetermined (fair) procedures are needed. If it is applied transparently and consistently, procedural justice has been done. In terms of substantive law, the essential justice of the law is guaranteed by a constitutional order (or political-legal and traditional institutions), especially the mechanism of complements between the representative institutions and judicial courts (Ly Ba, 2012: 11-25, 26-37, 38-55). In other words, institutions are the essential institutional foundation of The Rule of Law, providing minimal guarantees to the fairness and reasonableness of the law. Institutions, on the other hand, are merely

the setting, and The Rule of Law ensures that the spirit of the institution is fulfilled (Bo Li, 2000).

Currently, there are many definitions of The Rule of Law whose meanings and methods of application are more or less different, depending on the perception of the respective societies. To the narrowest extent, The Rule of Law is defined as “the restriction of arbitrary exercise of power by subordinating it to well-defined and established laws” (https://www.lexico.com/en/definition/rule_of_law); or “require only that government officials and citizens are bound by and must act consistently with the law” (Tamanaha, 2007: 3; 2012: 233). To a broader extent, The Rule of Law means that no one, including government is above the law, where laws protect fundamental rights, and justice is accessible to all” (OECD, 2013: 44); or “a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards” (UNSC, 2004). The Rule of Law also requires measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency (UNSC, 2004).

Some studies have shown the principles that The Rule of Law covers, can be divided into formal, procedural and substantive aspects (Blasek, 2015: 9-11; Waldron,

2016; Tamanaha, 2007, 2012). The formal principles emphasize the formality or characteristics that a legal system must have. For example, a law that is made by an authorized institution following rules and procedures must be transparent (open, accessible), general, clear, relevant, stable, predictable, fair and impartial applied. The procedural principles often refer to the due process of law as outlined above. Formal and procedural principles are regarded as The Rule of Law in a narrow sense and require a variety of institutions to be enforced, especially those that preserve and maintain the validity of laws and apply fair laws. The substantive principles/aspects are a controversial topic and are considered The Rule of Law in a broad sense, relating to several ethical-political values such as economic system (centralized planning/market), the form of government, the conception of human rights, etc. Some believe that The Rule of Law is only formal and procedural, while others are likely to add more substantive aspects.

The rule of law principles are defined differently by different organizations. The World Justice Project (WPJ), for example, bases on 4 general principles of The Rule of Law and a set of 9-factor criteria to assess the extent to which countries adhere to the rule of law (WPJ, 2020: 10-14). Australia's Magna Carta Institute (AMCI) offers 10 specific principles in practical application to demonstrate the relevance of the rule of law (<https://www.ruleoflaw.org.au/principles/>). Although there are certain differences in the number and content of the principles, WPJ and ACMI by nature both emphasize the supremacy of the law and mention other

important factors and institutions related to the quality, effectiveness, efficiency and suitability of laws.

In short, The Rule of Law can be recognized as a theory that considers the law and the supremacy of law the basic, the directional and dominant factor for the activities of a society. In other words, The Rule of Law implies a principle or mechanism that binds all subjects in society (state, organizations and individuals) to a common "rules of the game", in which laws are the standard for comparison. In that sense, The Rule of Law is often envisioned through a law-abiding society. However, laws under The Rule of Law must meet certain attributes and be protected and guaranteed by traditional legal and political institutions such as the presence of the constitution as a law that has higher legal value, decentralization, constitutional jurisdiction, an independent judiciary, etc. (Blasek, 2015: 11). It is this requirement that differentiates The Rule of Law from Rule by Law which implies law is used as an instrument of political power: the state uses the law to control its own citizens but does not allow the use of law to control the state, i.e., the state stands above the law.

The Rule of Law is now recognized as a universal value, in both academic research and political-legal practice. The United Nations considers The Rule of Law a global governance principle and serves as a foundation for international relations¹.

¹ Foreword, Article 1 of the United Nations Charter; Preface to the Universal Declaration of Human Rights; Resolution of the United Nations General Assembly on The Rule of Law dated November 30, 2012 (A/RES/67/1)

The European Parliament also regards The Rule of Law as a common principle of the states in the region (Gosalbo-Bono, 2010: 229-360; Nguyen Van Quan, 2017: 10-19; <https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=11593&lang=EN>).

2. The Rule of Law in relation to Rechtsstaat and État de Droit

Parallel to the development of The Rule of Law in Anglo-American, the Germans in the nineteenth century developed a theory of almost similar nature, Rechtsstaat, intending to limit the monarchy's power to protect life, freedom and property for members of society. Rechtsstaat is inspired by the positivist law doctrine, attaching importance to the state-issued, secular and written origin of the law; and therefore individual rights are also secular. The important element of Rechtsstaat is the protection of human rights and decentralization (subjective-public rights theory), and the supremacy of the law (a system of general, abstract, objective and non-retroactively rules) is reflected in the principle of legality. The only original and clear origin of the law is from the legislative authority of the state, through which the homogeneous spirit of the nation is expressed through the representative function of the Parliament. Therefore, Rechtsstaat is the law of the state, characterized entirely by the technical conception and form of law (Zolo, 2007: 11-13, Nguyen Minh Tuan, 2019). Rechtsstaat was established in the Basic Law (Constitution of the Federal Republic of Germany) in 1949, in the form of a principle that cannot be modified for any reason. The Federal Constitutional Court is the jurisdictional institution that guarantees the

superiority of the Constitution over statutes and lawmakers. Thus, it can be seen that Rechtsstaat has certain differences compared to The Rule of Law, namely, emphasizing the element of decentralization, appreciating the written law promulgated by the state, protecting human dignity.

In the early twentieth century, the État de Droit theory was introduced in France. This is an attempt to merge Rechtsstaat and The Rule of Law for application in France. État de Droit primarily aims to protect the rights of individuals from the discretion of the state by "self-limiting" the supreme power, binding it with respect for the principles of common values of the nation-state. According to État de Droit, people's sovereignty was vested in Parliament, having absolute supremacy over other branches of power; the law is recognized as an expression of the common will of the nation, so the executive power is strictly bound (by the legality); Judicial judges are not allowed to interfere in the exercise of legislative powers, and cannot suspend law enforcement. Since France does not adopt the judicial oversight mechanism as in the United States, there is a need to separate the Constitution from ordinary laws, in which the Constitution has the highest position and the Parliament is forced to respect the legal limits set out in the Constitution. In that way, État de Droit provides the people with a legal means against legislative acts that violated their fundamental rights (Zolo, 2007: 13-15).

Therefore, it can be seen that the core of Rechtsstaat and État de Droit is the notion of a "self-limited state". In the relationship between state and law, the state predates,

is the origin of law but the state also complies, placing itself under the law. The law does not impose on the state binding, objective and external limitations; but the state sets that limit on its own as the basis for exercising its power. Regardless of the subjective limitations, they are still binding on the state because disrespecting the law, breaking the limits by the state also means cancelling the legal order that forms the foundation for its own existence (Cao Huy Thuan, 2007). This way of thinking differs from the approach of The Rule of Law which assumes that natural law and rights predate and transcend state as well as positive law. The natural law and rights are also the soul of The Rule of Law. In fact, despite their metaphysical nature, they are the basis for creating more coherent, rational and efficient state control mechanisms than the two theories of Rechtsstaat and État de Droit.

Regardless of the differences as mentioned, there exist common points between The Rule of Law, Rechtsstaat and État de Droit, that is to define the position of law as the operating foundation of society; determine the finite and non-absolute of state power; and require for limits and control of state power to protect human rights (Blasek, 2015: 11). These common features are reflected in the characteristics of the state. Even in The Rule of Law, Rechtsstaat and État de Droit, the state is not allowed to do whatever it wants but must respect and behave under the law.

3. The Rule of Law in relation to the “rule-of-law state” in Vietnam

The term État de Droit was translated into “a state of law” or “a state that respects the

law” (Le Dinh Chan, 1975: 98-109), or “rule by law” (Nguyen Van Bong, 1969) in the legal science of South Vietnam before 1975, referring to a political regime in which the government is limited within the framework of the law (Nguyen Van Bong, 1969), as opposed to the concepts of “authoritarian state/regime”. Meanwhile, some studies show that the term “a rule-of-law state” only appeared and used in Vietnam since 1991 (Gillespie, 2010; Cao Huy Thuan, 2007), translated from the term *Provovoye gosudarstvo* (a reform direction that the Russians learned mainly from German’s Rechtsstaat concept) (Ulitsky, 1993: 70-74; Gillespie, 2010), to replace the term “socialist legality” inspired from Russia’s Sotsialisticheskaya zakonnost theory (Gillespie, 2010: 80). The term rule-of-law state was officially used at a conference of the Communist Party of Vietnam in 1994 (Communist Party of Vietnam, 2006: 393), and was constituted in the Constitution 1992 at its annual revision in 2001 as the socialist rule of law State.

In recent years, another (new) term of “principles of the rule of law” has been widely used and much discussed in Vietnam. It appeared for the first time in Resolution No. 48-NQ/TW dated 24 May 2005 of the Party, then continued to be present in the abbreviated form “the rule of law” in the documents of the 11th and 12th National Congress of the Party and the Report of 30 years of reform of the Party (Nguyen Xuan Tung, 2019; Communist Party of Vietnam, 2015: 145). However, specific signs or content of the rule of law principles are not clearly stated therein (Nguyen Duc Minh, 2018a: 4).

Depending on the views and perceptions of each Vietnamese law researcher, The Rule of Law can now be translated as the rule of law, the rule of law principles, the rule by law, and the rule-of-law state (Nguyen Duc Minh, 2018b: 3; Nguyen Dang Dung, 2014: 55; Nguyen Van Quan, 2017: 10-19; Nguyen Duc Minh, 2019: 3-8, 23). In general, the defining characteristics of the rule-of-law state in Vietnam have been identified as follows (Dao Tri Uc, 2015: 266-267; 2006: 233-315): (1) State of the people, by the people, for the people, demonstrating the people's right to mastery; (2) The State is organized and operates based on the Constitution, respecting and protecting the Constitution; (3) State power is unified, with assignment, coordination and control among state agencies in the exercise of legislative, executive and judicial powers; having strict inspection and supervision of the implementation of the people's state power through social organizations; (4) The State manages the society by law, ensuring the supremacy of law in social life; (5) Respect and protect the human rights, rights and freedom of citizens; (6) The state and society are led by a single party, the Communist Party of Vietnam.

While the rule-of-law state is in common use in Vietnam, in our opinion it should (if any) be understood only as of the translation of *Rechtsstaat* or *État de Droit*, but not of The Rule of Law for the following reasons. First, in terms of terminology, the rule-of-law state is the translation of *Provovoye gosudarstvo* - the Russian way of understanding *Rechtsstaat*. Thus, the rule-of-law state can be considered the equivalent translation of *Rechtsstaat*

according to transitive relation. Second, The Rule of Law and *Rechtsstaat* are two theories and traditions with different characteristics as analyzed above (Nguyen Minh Tuan, 2019; Silkenat et al., 2014). Therefore, the rule-of-law state cannot be equivalent to The Rule of Law.

In terms of the rule-of-law principles, some indirect contents mentioned in Resolution 48 can be viewed as its constituent including quality of law, the validity of law, protection of human rights, limitation and control of state power. Based on this approach, the rule-of-law principles in Vietnam is asymptotic to The Rule of Law in the general sense, that is, considering it a principle and the criteria set by WJP and AMCI constituent attributes.

However, the details of the rule-of-law principles should continue to be concretized. Many of the 9 factors identified by the WJP have not been properly concerned, even have not been associated with the content of the Rule of Law and the rule-of-law state according to popular conception in Vietnam, namely, unofficial judiciary, open government, free from corruption. Other factors have the corresponding basic contents in Resolution 48 and several Party documents. In general, from the political-legal perspective, the factors identified by the WJP do not conflict with the lines and policies of the Party and the laws of the State, so they could be used for reference in determining the rule-of-law principles in Vietnam.

Some recent studies in Vietnam applying this approach suggest that The Rule of Law can be understood as a principle or a category with many principles, which

are specific content or attributes of the rule of law state in the sense of a principle (Nguyen Duc Minh, 2018a: 5). In other words, The Rule of Law is the rule-of-law principle and is one of the principles of the rule-of-law state (Nguyen Duc Minh, 2019: 6; 2018a; 2018b). If The Rule of Law is considered a principle, its content is too narrow to the core content of The Rule of Law that “the government exercises its power legally under the Constitution and by procedural laws” (Nguyen Duc Minh, 2019: 6; 2018a: 4-7). Moreover, the view of The Rule of Law as a principle of the rule-of-law state or rule-of-law based state is not so convincing.

Conclusion

The Rule of Law implies a law-abiding society and is guaranteed by a constitutional order - the institutional framework. The Rule of Law focuses on issues such as limiting and controlling state power, protecting human rights, ensuring laws are built fairly and reasonably and effectively enforced in practice. Internationally, The Rule of Law is understood as a principle governing the activities of all actors in society, not just the state apparatus, even though it is the primary and most important subject of adjustment. Therefore, from the approach of The Rule of Law, it is necessary to build a “rule-of-law society”, not a “rule-of-law state”.

It is seen from the above analysis that the current awareness of the Vietnamese researchers about The Rule of Law remains inconsistent and irrational at some points, especially the tendency to equate The Rule of Law with the rule-of-law state. From an academic perspective, The Rule of Law

and the rule-of-law state and/or the rule-of-law principles in Vietnam have some points in common, but they are not identical. It is worth noting that homogeneous terminology leads to the identical constituent elements between The Rule of Law and the rule-of-law state, which significantly narrows the meanings of The Rule of Law and change the target to a rule-of-law state instead of a rule-of-law society.

Considering both theoretical and practical perspectives and domestic and international requirements, Vietnam needs to build “the rule-of-law society” according to the approach of The Rule of Law, not just end at the rule-of-law state according to the above-mentioned approach of domestic researchers. To do this, it is necessary to be more fully aware of The Rule of Law and carry out institutional reforms to ensure the supremacy of the law such as law-making mechanism reform, empowering judges to explain laws, and establishing constitutional jurisdiction □

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